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No. 84-1842

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

FRANK TORRES,

Petitioner,

vs.

LITTLE FLOWER CHILDREN'S SERVICES, RALPH CHILLION, THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES, CAROL PARRY, ANN CAHALAN, SUSAN McCAULEY and JOHN AMBERG,

Respondents.

MUNICIPAL RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

FREDERICK A. O. SCHWARZ, JR.,
Corporation Counsel for the City of
New York,
Attorney for Municipal Respondents,
100 Church Street,
New York, N.Y. 10007.
(212) 566-8306 or 566-4330

FAY LEOUSSIS,
PAMELA SEIDER DOLGOW,
of Counsel.

July 22, 1985.

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QUESTION PRESENTED

Whether petitioner, who failed to learn to read and write, despite a public school education, was deprived of property or liberty without due process of law?

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STATEMENT OF THE CASE

In 1964, when petitioner, Frank Torres, was seven years old, his mother abandoned him and respondent New York City Department of Social Services ("DSS") assumed responsibility for his care (N.Y. Soc. Serv. L., §398, subd. 6, par [k]) (PA17,

PA17, PA45, PA148-PA150).* On June 6, 1964, DSS placed him with respondent Little Flower Children's Services ("Little Flower"), an authorized child care agency (N.Y. Soc. Serv. L., §371 [subd. 10]). Pursuant to a purchase of service agreement, DSS reimbursed Little Flower for the costs which Little Flower incurred in providing for petitioner's basic care (PA 17). The contract, renewable on a yearly basis, defined the basic care to be provided children placed with the child care agency as: "[t]he provision of room, board, clothing, recreation, medical and dental care and treatment and the arrangement, as needed, of religious training, education and vocational training" (PA45, PA173). In accordance with the agreement, Little Flower arranged for petitioner to attend P.S. 181M, a school maintained by the New York City Board of Education on Little Flower's premises (PA45,

*Numbers in parentheses preceded by the letters "PA" refer to pages of Petitioner's Appendix to the New York State Court of Appeals.

PA59).*

When petitioner arrived at Little Flower in 1964, he spoke English poorly, Spanish being his native language (PA139). However, by his own admission, he could understand English "around the third grade" (PA166).

According to a report prepared by Little Flower, petitioner was determined in a 1967 psychological study to suffer from borderline retardation; he had a verbal I.Q. of 65, a performance I.Q. of 86 and a full scale I.Q. of 72 (PA140-PA141). Personnel at Little Flower were of the opinion that the school on its premises was equipped to deal with children with disabilities and petitioner was not referred elsewhere (PA143). For most of the period he attended P.S. 181M, petitioner was placed in a regular class; he was placed

*The New York City Board of Education and Florence Price, the principal of P.S. 181M while petitioner was in attendance, were originally named as defendants in this action (PA25-PA26, PA15). On his appeal to the New York State Court of Appeals, petitioner discontinued his action against both parties.

in a special class for only a short time after the seventh grade (PA167). In light of his perceived condition, teachers at the public school assigned him a lesser work load (PA140-PA141).

Throughout his attendance at P.S. 181M, petitioner was a non-reader (PA162). His reading problem was regularly discussed at conferences convened at Little Flower for the purpose of planning for his welfare (PA162). The conferences were attended by petitioner's teachers, the school's principal, and members of the psychiatric, psychological and clinical staff employed by Little Flower (A162).

In March, 1972, a Little Flower social worker took petitioner to a reading specialist, Theodore H. Haegele, who administered a series of tests "to determine the reason for the reading retardation so that adequate remediation can be initiated as well as accomplishing appropriate educational planning after graduation in June, 1972" (PA158). The reading specialist concluded that petitioner was not retarded but suffered from an "extremely complex

reading disability" which was most probably the result of subtle neurological impairment (PA159, PA160). He said: "To outline a remedial approach for Frank would be synonymous with writing a textbook" (PA160). However, he did recommend a method which had been described in detail in a designated publication (PA160). He was careful to note, however, that the process would be long and tedious and that progress would be made only in small steps (PA160).

Following the testing, tutoring in reading was arranged for petitioner by Little Flower, although the particular method recommended by the reading specialist was never implemented (PA167-A168). Little Flower arranged for further tutoring upon petitioner's graduation from eighth grade in June, 1972 (PA19, PA168). After some months, petitioner stopped attending the tutoring sessions because no transportation was provided and the sessions were not a convenient distance from his group home (PA168). In October, 1972, petitioner was enrolled in a BOCES (Board of Cooperative Educational

Services) school and placed in a class for the educable retarded, but he was expelled for behavioral reasons in March 1973 (PA144). Little Flower discharged petitioner from its care in March, 1976 when petitioner was 18 years old. (PA17).

Alleging that he is functionally illiterate, petitioner, in 1977, commenced this action for money damages against DSS, Little Flower, several individuals associated with them, and the New York City Board of Education and school principal (the last two since dropped from the suit). As pleaded in the complaint, petitioner predicated his action on three distinct theories of liability: (1) that respondents breached their legal duty to educate him in that they failed to (a) diagnose his reading deficiencies until 1972 (PA20, PA30), (b) provide him with a suitable reading and vocational program at any time (PA20, PA30), and, (c) provide him with a suitable plan for obtaining reading and vocational instruction after he was discharged from the custody of DSS (PA20-PA21, PA30); (2) that in failing to provide him with an appropriate education

and vocational training, Little Flower and DSS breached their obligation to him as a third-party beneficiary of the contract between Little Flower and DSS (PA21, PA30); and (3) that in failing to provide him with an appropriate education as guaranteed by the Constitution and laws of the State of New York, without either a hearing or other administrative proceeding, respondents violated his rights under the Due Process Clause of the Fourteenth Amendment of the United States Constitution and 42 U.S.C., section 1983 (PA21, PA30-PA31).

Municipal respondents moved for summary judgment dismissing the complaint on the ground that they could not be held liable for the failure of an individual to obtain an appropriate education (PA44-PA47). Little Flower similarly moved for summary judgment on the ground that the claim sounded in educational malpractice which is not a cause of action cognizable in the courts of New York State (PA48-PA56).

Special Term granted respondents' motions for summary judgment and dismissed the complaint, characterizing the negligence claim as educational malpractice, and, as such, barred by the Court of Appeals' decision in Hoffman v. Board of Education of the City of New York, 49 NY2d 121 (1979). Special Term also found that respondents met their contractual duties by the placement of petitioner in a public school. The Court did not address the constitutional claim. The Appellate Division affirmed, without opinion. 94 AD2d 987, 463 NYS2d 349 (1st Dept., 1983).

The New York Court of Appeals affirmed the dismissal of the complaint in a decision reported at 64 NY2d 119, 485 NYS2d 15 (1984).* The Court of

*Initially, petitioner appealed to the New York Court of Appeals, as of right, on constitutional grounds invoking CPLR 5601(b). The Court of Appeals dismissed the appeal for lack of a substantial constitutional question. 60 NY2d 701 (1983). Thereafter, petitioner sought, and, on February 21, 1984, was granted leave to appeal to the Court of Appeals pursuant to CPLR 5602(1)(i). 61 NY2d 606.

Appeals held that the public policy considerations enunciated in Donohue v. Copiague Union Free School District, 47 NY2d 440 (1979) and Hoffman v. Board of Education, 49 NY2d 121 (1979) barring educational malpractice claims against school districts apply with equal force to the child's legal custodians when the same claim is lodged against them. The Court reasoned as follows (64 NY2d at 126-127):

> What is at the root of the policy enunciated in Hoffman and Donohue is not the identity of the defendant but the nature of the determinations courts would be called upon to make. This policy is equally applicable whether the student challenges educational decisions made by the Board of Education or by his guardians in response to actions taken by school officials, for in either situation the court would be thrust into the position of reviewing the wisdom of educator's choices and evaluations. Here, for example, [petitioner's] allegations would require the courts to assess the nature of his difficulty in learning, including such elusive factors as his own attitude, motivation, temperament, past experience and home environment [citation omitted], to examine Board of

> Education policies and their implementation by school officials — the very role we have already declined to assume — and then in addition to determine whether the guardian's responses to these policies and decisions constituted negligence. While we have noted the right of students and parents to question choices made by educators [citation omitted], we did not imply that the exercise of such a right would give rise to damage suits for negligence.

For the same policy reasons, the Court of Appeals held that petitioner's cause of action based on contract must also fail.

Lastly, in finding petitioner's constitutional claim to be without merit, the Court held (64 NY2d at 128-129):

> Finally, [petitioner] cannot succeed on his constitutional claim that he was deprived of his state-created entitlement to an "appropriate" education without a hearing. [Petitioner] does not complain that he was deprived of any particular program he was then enjoying. (See Board of Regents v. Roth, 408 US 564, compare Goss v. Lopez, 419 US 565). Further, the "entitlement" at issue cannot be determined through the application of objective criteria. Rather, it

> depends upon the decisions of professional educators as to the needs of a particular student. Such nebulous entitlements do not lend themselves to protection through the procedural due process requirement. Indeed, they do not even come into existence until the discretionary determination as to what is appropriate is made. Though a due process protection may well apply when the child is not placed in school at all (see Patton v. Dumpson, 425 F Supp 621, 625), no such claim may be advanced. (See, also, Donohue v. Copiague Union Free Dist. (47 NY2d 440, 443, supra).

REASONS FOR DENYING THE WRIT

Petitioner contends that "[t]his Court's review is essential to decide the critically important question whether the state's refusal to engage in any reasonable or rational decision-making concerning its ward's education deprived him of property and liberty without due process of law" (Petition at 16-18). Petitioner argues first, that he had property and liberty interests in a state-created right to an appropriate education; and second, that he was deprived of due process of law when he was denied

his state property and liberty rights without reasonable decision-making.

We submit that the New York Court of Appeals correctly determined that respondents' actions in placing petitioner in a public school maintained by the New York City Board of Education on the premises of Little Flower, based on the belief that the school was equipped to deal with children with disabilities, did not deprive him of due process. The decision is not in conflict with any decision of this Court or any other federal Court of Appeals. Further, there is no compelling federal issue of wide-spread public importance presented. This case involves the misdiagnosis of a child as retarded who, in fact, suffered from an "extremely complex reading disability" (PA159-PA160) and who never learned to read. The fact that, in hindsight, a mistake may have been made or that the best possible educational program may not have been provided does not give rise to a constitutional violation. Thus, further review is unwarranted and the petition for a writ of certiorari

should be denied.

(1)

Preliminarily, we note that there is no fundamental constitutional right to an education (Plyer v. Doe, 457 US 202, 223 (1982); San Antonio Independent School District v. Rodriguez, 411 US 1, 42 [1977]; rather, public education is committed to the control of state and local authorities [Board of Curators v. Horowitz, 435 US 78, 91 (1977); Board of Education v. Rowley, 458 US 175, 208 (1982); San Antonio Independent School District v. Rodriguez, supra, 411 US at 42; Epperson v. Arkansas, 393 US 97 (1968)]. Thus, petitioner's entitlement to an education, as he himself concedes (Petition at 17), is created and defined by state law.

Petitioner misconstrues the nature of the right to an education conferred by the New York State Legislature. The right which has been constitutionally created (NY Const., Article XI, §1) and statutorily established (N.Y. Educ. L., Art. 65) in New York is a right of entitlement of all children of the State to a free public school education, not a

right of each student within the system to an individualized level or quality of education.* Donohue v. Copiague Union Free School District, 47 NY2d 440, 443 (1979); see, Levittown UFSD V. Nyquist, 57 NY2d 27, 47-48 (1982); Patton v. Dumpson, 425 F Supp 621, 625 (SDNY, 1977); cf. Lisa H. v. State Board of Education, 67 Pa. Commw. 350, 447 A2d 669, 673-674 (Commonwealth Ct. of Pa., 1982), aff'd, 467 A2d 1127 (Sup. Ct. Pa. 1983).

"To have a property interest in a benefit, a person clearly must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Board of Regents v. Roth, 408 US 564, 577 (1972). Petitioner claims that he was deprived of a state-created entitlement to an "appropriate" education without due process. (PA30). However, there cannot be a property right created in an "appropriate" education

*Where there is an authoritative interpretation of state law by the State's highest Court, this Court is foreclosed from an independent examination of the state law issue. See Bishop v. Wood, 426 US 341, 345-347 (1976).

in New York because, under state law, educators have absolute discretion and flexibility in determining what constitutes an "appropriate" education in each individual case. Hoffman v. Board of Education, supra, 49 NY2d 121; Donohue v. Copiague Union Free School District, supra, 47 NY2d 440. Cf. James v. Board of Education, 42 NY2d 357, 367-368 (1977).

Indeed, as the New York Court of Appeals correctly noted in this case, the "entitlement" at issue cannot be determined through the application of objective criteria but, rather, depends upon the decisions of professional educators as to the needs of a particular student. The Court properly found that such nebulous entitlements do not lend themselves to due process protection. Indeed, such "entitlements" do not even come into existence until the discretionary determination as to what is appropriate is made.

Where the grant of a benefit is within the broad discretion of the one making the decision or where the restraints on that discretion are merely

procedural, no protectable property or liberty interest is created. See Meachum v. Fano, 427 US 215, 228-229 (1975); Pugliese v. Nelson, 617 F2d 916 (2d Cir. 1980); Marciano v. Coughlin III, 510 F Supp 1034, 1037 (EDNY, 1981). In the instant case, under the controlling statutes, DSS has the duty to care for abandoned children (SSL, §395; 398, subd. 2, par [b]), to provide vocational training in certain circumstances (SSL, §398, subd. 6, par [k])* and to supervise the child care agency in which the child is placed [SSL, §398, subd. 6, par [g]). Pursuant to regulations in effect at the time petitioner was in foster care, the child care agency must arrange for the child to "receive suitable education as required by law" (formerly 18 NYCRR §5.19, presently codified as 18 NYCRR §441.13). Either agency may seek administrative review of any decision made by

*This section provides that DSS has the duty to provide suitable vocational training for any minor in its care who demonstrates to its satisfaction "the possession of talent, aptitude and ability necessary to benefit therefrom, provided such minor could not otherwise obtain such training."

school officials (N.Y. Educ. L., §310), including those with respect to special services available for handicapped children (N.Y. Educ. L., §4402).

Since the very question of what constitutes a suitable education for a particular child necessarily involves the professional judgment and discretion of educational experts charged with the duty of educating the children of New York State, petitioner did not have "a legitimate claim of entitlement" (Board of Regents v. Roth, supra, 408 US at 577) to any particular educational program or course of study. Nor did he have an entitlement to a minimal level of education. Further, this is not a case where petitioner complains that he was deprived of any particular program he was then enjoying. See Goldberg v. Kelly, 397 US 254 (1979); compare, Goss v. Lopez, 419 US 565 (1975). Therefore, no property interest requiring due process protection was created.*

*Equally unavailing is petitioner's conclusory claim, unsupported by any citation of authority, that he

(footnote cont'd on next page)

(2)

Assuming, arguendo, that petitioner had a property or liberty interest in an "appropriate" education requiring due process protection, petitioner received all the process that was due. Petitioner has abandoned his claim, made below, that respondents, in failing to provide him with an appropriate education "without either a hearing or

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* (footnote cont'd from previous page)

possessed a "liberty" interest in an appropriate education. (Petition at 17, 23). Petitioner's further claim that "as a ward of the state, [he had] an undoubted liberty right not to be treated and educated as if he were retarded when, in fact, there was no rational basis for doing so" is raised for the first time in his Petition to this Court. It is well-settled that in appeals from state courts, this Court is without jurisdiction to review federal claims that were never raised in the state court. Cardinale v. Louisiana, 394 US 437, 438 (1969). In any event, petitioner's claim is without merit. While "there can be no doubt that the meaning of 'liberty' must be broad indeed" (Board of Regents v. Roth, supra, 408 US at 572), and includes the opportunity to make a range of personal decisions concerning one's life, family and private pursuits (BAM Historic District Ass'n. v. Koch, 723 F2d 233 [2d Cir. 1983]), the concept of liberty has never been extended to a situation, such as this one, where the appropriateness of an educational program is being questioned.

any other administrative proceeding" violated his due process rights (PA30). He now appears to contend that the process that is due in this situation is "some sort of rational decision-making process" (Petition at 25). Recognizing that this Court and the New York Court of Appeals have made it clear that it is inappropriate for the judiciary to be engaged in second-guessing professional judgment (see, Youngberg v. Romeo, 457 US 307, 322-323 [1982]; Parham v. J.R., 442 US 584, 607-609 [1978]; Hoffman v. Board of Education, supra, 49 NY2d 376), petitioner contends that no professional judgment at all was exercised in his case. Petition at 29-30. The record belies petitioner's claim.

Petitioner was misdiagnosed as retarded. It now appears that his inability to learn to read was based on a "subtle neurological impairment," which all the experts agreed is not easily overcome. The diagnosis was based both on tests administered by experts and on petitioner's school performance, which indicated borderline retardation. His educational program was geared accordingly. The

record simply does not support petitioner's assertion that absolutely nothing was done in his case. Petitioner was placed in and attended a public school maintained by the New York City Board of Education based on Little Flower's assessment that the school was equipped to deal with children with disabilities. His reading problem was regularly discussed in conferences held at Little Flower which were attended by professional educators, social workers and psychologists from both the Board of Education and Little Flower for the purpose of planning for his welfare. At age 14, special testing was arranged for him by Little Flower. When petitioner's problem was diagnosed, tutoring in reading was arranged for him, which he voluntarily discontinued. When petitioner graduated from eighth grade, he was enrolled in a BOCES program, but problems developed and he was expelled for behavioral reasons. As the Court of Appeals noted in this case, "[petitioner's] underlying contention is not that defendants ignored any specific statutory direction to conduct reviews, for the record

indicates that they conferred periodically about [petitioner's] problem, but that they erroneously concluded that the public school was equipped to deal with them." 64 NY2d at 127, n. 3.

Thus, at the heart of this case is petitioner's disagreement with respondents' professional judgment that P.S. 181M, the public school located on the premises of Little Flower, could offer petitioner an appropriate education. However, the fact that, in hindsight, a mistake may have been made based on a misdiagnosis of petitioner's condition and the best possible program may not have been provided does not rise to the level of a due process violation. In Bishop v. Wood, supra, 426 US at 349-350 (1976), this Court noted in another context that:

> Federal court is not the appropriate forum in which to review the multitude of ... decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal

judicial review for every such error.

Contrary to petitioner's assertions, the children of New York State are not left remediless if they, or their parents or legal guardians, disagree with the educational program offered to them. New York law provides a full-scale administrative hearing before the State Commissioner of Education for any child whose parents or legal custodians are dissatisfied with the educational program being offered to the child. N.Y. Educ. L., §310; Donohue v. Copiague Union Free School District, supra, 47 NY2d at 445; Hoffman v. Board of Education of the City of New York, supra, 49 NY2d at 127. Petitioner's complaint is that his legal custodians did not invoke this procedure in his particular case (Petition at 16). However, that decision also turns on the exercise of professional judgment and discretion. As noted, Little Flower was of the belief that the school on its premises was equipped to deal with children with disabilities and petitioner was not

referred elsewhere.* Such a decision is for the educational experts and the professionals on the staff of DSS and Little Flower and not for the courts. The New York Court of Appeals has repeatedly held that the courts of New York may not substitute their judgment on educational matters for the professdional judgment of educators and government officials "actually engaged in the complex and often delicate process of educating the many thousands of children in our schools." Hoffman v. Board of Education, supra, 49 NY2d at 125-126; accord: Donohue v. Copiague Union Free School

*It is significant that the New York Court of Appeals held in this case that respondents' statutory duties were met by placing petitioner in a public school operated by the New York City Board of Education. 64 NY2d at 127. See, N.Y. Educ. L., §§3205(1)(a), 3212. The Court further noted that the Board of Education was the party charged with furnishing petitioner's public school education and was thus primarily at fault if he indeed received a deficient education. 64 NY2d at 129. As noted, petitioner acknowledged in the Court of Appeals that recovery was precluded against the Board of Education and, consequently, dropped the Board of Education as a party to this lawsuit.

District, supra, 47 NY2d 440; Bokhair v. Board of Education, 43 NY2d 855 (1978); James v. Board of Education, supra, 42 NY2d at 367-368; Paladino v. Adelphi University, 89 AD2d 85, 91-92 (2d Dept., 1982). This Court has similarly cautioned that courts "lack the 'specialized knowledge and experience' necessary to resolve persistent and difficult questions of educational policy' ". Board of Education v Rowley, supra, 458 US at 208, quoting San Antonio Independent School District v. Rodriguez, supra, 411 US at 42. See Youngberg v. Romeo, supra, 457 US at 323-324 ("courts should not ' "second-guess the expert administrators on matters on which they are better informed" ' ").

Moreover, petitioner had a post-deprivation remedy available to him in the nature of an Article 78 proceeding* in State court which he, in fact, utilized. See Hudson v. Palmer, ___ US ___, 104 S Ct 3194, 3204 (1984); Parratt v. Taylor, 451 US 527,

*N.Y. Civ. Prac. Law and Rules, Article 78.

536-37, 540 (1984). As noted by petitioner, himself, at the same time he initiated this action, petitioner filed an Article 78 proceeding* against the New York City Board of Education and others "seeking to obtain the education to which he was entitled under New York law". Petitioner's Brief to New York Court of Appeals, p. 52, n. 36. Special Term directed the Board of Education "to furnish Torres, insofar as is feasible, with appropriate evaluation and special program services. . . ." Torres v. Parry, supra, decision dated September 9, 1977. On a subsequent motion in that case, Special Term ordered the Board of Educaton to either provide petitioner with a program "where he may learn to read and write," or be liable for the cost of a private program of his own choosing. Torres v. Parry, NYLJ, June 8, 1978, p. 10, col. 5, N.Y. Co. Sup. Ct.**

*Torres v. Parry, Index No. 10666/77 (N.Y. Co., Sup. Ct., 1977).

**Petitioner, had, in fact, begun a remedial reading program at Long Island Jewish-Hillside Medical Center in 1977 (PA152-PA154).

In sum, petitioner had no state-created property or liberty interest in an "appropriate" education protected by the due process clause of the Fourteenth Amendment. Assuming, arguendo, that such an interest was created, petitioner received all the process that was due by the exercise by his legal guardians and school officials of professional judgment (based on tests administered to him and on petitioner's school performance), as to what educational program was appropriate for him. Further, New York State provides both administrative review in the form of a hearing before the State Commissioner of Education (N.Y. Educ. L., §310) to challenge educators' choices as to appropriate educational programs, and judicial review of agency determinations in the form of an Article 78 proceeding in state court to challenge decisions made by administrative officials. In light of the above, the petition should be denied.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

July 22, 1985

Respectfully submitted,

FREDERICK A. O. SCHWARZ, JR.,
Corporation Counsel for
The City of New York,
Attorney for Municipal Respondents.

FAY LEOUSSIS,
PAMELA SEIDER DOLGOW,
of Counsel.